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No. 08-

IN THE

Supreme Court of the United States

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA ET AL.,
Petitioners,

v.

VIOLA NAOMI WASHINGTON ALLEN ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of Louisiana, Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are insurance companies that issued policies to a housing authority in connection with its operation of an affordable housing development. A class action was brought against the housing authority in Louisiana state court after it was discovered that the land on which the development was built was contaminated.

The trial court awarded, and the Louisiana Court of Appeal approved, damages to individuals for their personal emotional distress and lost individual property value on the basis of evidence that was not specific to those individuals, but was based entirely on classwide formulas. The state court also directed the insurance companies to pay "all sums" owed by the housing authority to the class – including damages owed to plaintiffs who did *not* live on the insured property – subject only to a right to seek contribution from the insured and other defendants for any amount beyond the policies' terms.

The questions presented are:

1. Whether the Due Process Clause permits a court to order insurers to pay damages on behalf of an insured that are concededly outside the limits of the insurers' policies and not otherwise attributable to them.

2. Whether the Due Process Clause permits a court to assess damages in a class action for injuries that are unique to the claimants on an aggregate basis that does not take each claimant's individual circumstances into account.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioners are National Union Fire Insurance Company of Pittsburgh, PA ("National Union") and U.S. Fire Insurance Company ("U.S. Fire"). National Union is a direct, wholly-owned subsidiary of AIG Commercial Insurance Group, Inc., which is a wholly-owned subsidiary of AIG Property Casualty Group, Inc., which is a wholly-owned subsidiary of American International Group, Inc., a publicly traded corporation. U.S. Fire is an indirect subsidiary of ACE Limited, a publicly traded corporation.

Respondents are individuals who are class representatives in this class action. They are Phyllis Minerva George Smith, Don Harrison Lewis, Sr., Nathan Parker, Viola Naomi Washington Allen, Peggy Williams Grandpre, Lizette Gaines Watson, Fannie Lee Johnson, Iris Russell Myers, and Diarra Ayodele McCormick. The case was captioned *John Johnson et al. v. Orleans Parish School Board et al.* in the lower courts, but John Johnson is not presently a named class representative and the Orleans Parish School Board is not joined in this petition.

The other parties who participated in the proceedings before the Louisiana Court of Appeal are the City of New Orleans, the Housing Authority of New Orleans, the Orleans Parish School Board, Republic Insurance Company, and Louisiana Insurance Guaranty Association (as successor in interest to Southern American Insurance Company).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeal of Louisiana, Fourth Circuit, in this case.

DECISIONS BELOW

The opinion of the Louisiana Court of Appeal is reported at 975 So. 2d 698 and is reprinted in the Appendix ("App.") hereto at 1a. The trial court's judgment and reasons for judgment are unreported and are reprinted at App. 41a and App. 65a.

JURISDICTION

The opinion of the Louisiana Court of Appeal was issued on January 30, 2008. The Court of Appeal denied petitioners' applications for rehearing on February 27, 2008. The Supreme Court of Louisiana denied petitioners' applications for a writ of certiorari on June 27, 2008. Justice Scalia extended the time in which to file this petition to October 27, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Section 2403(b) of Title 28 of the United States Code may apply. This petition has been served on the Attorney General of the State of Louisiana.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause, U.S. Const. amend. XIV, provides:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . .

STATEMENT OF THE CASE

There are few principles of due process more basic than that forbidding the government simply to "take[] property from A. and give[] it to B." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.). But the decision below does exactly that. Petitioner insurance companies issued policies that, the state court expressly acknowledged, covered only *part* of the damages owed by the insured tortfeasor to respondents. The court nonetheless announced that the insurers were obligated to pay damages beyond their coverage terms, subject only to an illusory right of contribution from the insured or other defendants for the amounts beyond the policies' coverage. That holding lacks any justification in law or contract, and it contravenes the insurers' rights to due process.

The state court ran afoul of a second due process protection as well. The plaintiffs in this class action sought emotional distress and lost property value damages based on the contamination of their respective properties with toxic substances. Rather than determine these inherently individualized compensatory damages on individual proof, the state court assessed them on the basis of classwide formulas. That end-run around the necessary proof deprives the defendants of the chance to address each plaintiff's *actual* damages, thus denying them their fundamental due process right "'to present every available defense.'" *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

The Louisiana Court of Appeal enlarged the damages available to the class plaintiffs by disregarding due process principles long settled by this Court and consistently respected among lower courts. The judgment below cannot stand.

A. Factual Background

The City of New Orleans used a parcel of land in its Ninth Ward as a municipal landfill until 1958, and again in 1965. App. 4a. Beginning in 1967, the site – known as the Agriculture Street Landfill ("ASL") – was host to a number of development projects. App. 5a-6a. The first was an affordable housing development known as "Press Park": following an agreement between the City and the Housing Authority of New Orleans ("HANO"), a private developer constructed the Press Park homes, and in 1971 HANO purchased and began operating the Press Park properties. App. 5a. A portion of some Press Park tenants' rent went toward the purchase of their houses. *Id.* HANO was not involved with other developments on the ASL site, including a tract of housing built by the City known as "Gordon Plaza," and an elementary school built by the Orleans Parish School Board. *Id.*

Between 1976 and 1985, HANO obtained a succession of comprehensive general liability insurance policies related to its operation of Press Park; it was otherwise uninsured. App. 25a-26a. Petitioner U.S. Fire's policy was in effect from 1978 to 1981; petitioner National Union's policy was in effect from 1981 to 1984. *Id.*

In 1993, the Environmental Protection Agency ("EPA") conducted tests on the ASL site and deter-

mined that the soil was contaminated with toxic materials. App. 7a. In 1994, the agency pronounced the area a Superfund site. *Id.* The EPA financed a $20 million remediation project in which one to two feet of contaminated soil was replaced and a barrier laid down between the clean and contaminated layers. App. 8a. The EPA notified residents of the completed project, issued restrictions on the use of their property, and advised them that they were responsible for looking after the clean topsoil and barrier. *Id.*

B. Proceedings Below

1. A number of persons with some connection to the ASL site filed a class action against the City, HANO, the School Board, and HANO's former insurers,[1] seeking recovery in tort for emotional distress and lost property value damages owing to the site's contamination. Four plaintiff sub-classes were certified: (1) persons who resided on or near the ASL site for at least a year before 1994; (2) persons who operated a business on or near the site for at least a year before 1994, and their employees; (3) current residents of the site or the area nearby who own or are buying their homes; and (4) former employees of and students at the elementary school on the site, who attended or worked at the school for at least a school year before 1994. App. 9a.

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[1] The plaintiffs were authorized to sue the insurers directly pursuant to La. Rev. Stat. § 22:655(B), which provides: "The injured person . . . shall have a right of direct action against the insurer within the terms and limits of the policy . . . ."

2. After a bench trial, the trial court entered judgment in favor of the plaintiffs. App. 66a. The trial court found that the City, HANO, and the School Board were negligent and that their negligence was a cause of the plaintiffs' damages; it also found that HANO was strictly liable to the Press Park tenants and residents. App. 104a-106a.

But HANO's liability did not stop with the Press Park property owners and tenants, the court concluded. Instead the court found HANO jointly liable with the City for *all* development on the ASL site – even though HANO had nothing to do with the planning, construction, or management of any project but Press Park. App. 107a-109a.[2] The court held that HANO could be made liable for pre-existing contamination on *other* property because a cooperative agreement HANO and the City executed in 1967 for the purpose of building Press Park "was still in place in the late 1970s, when the next phases of the neighborhood were planned." App. 109a. The court did not explain how an agreement HANO entered into solely to facilitate construction of Press Park could force HANO to incur liability for the City's own, entirely separate development efforts a decade later.

The court also held HANO solidarily liable with the City to plaintiffs in the area *adjacent* to the ASL site. App. 51a-52a. But many of the homes and businesses in the adjacent area were built *decades*

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[2] The Court applied Louisiana's pre-1980 law of joint – or "solidary" – liability. That statute was amended in 1980, and did not impose solidarity liability after that date for HANO's conduct.

before HANO's 1967 Cooperative Agreement with the City, while the ASL site was still a landfill. *See* HANO 4th Cir. Corr. Orig. Br. 1. Again, the court did not explain how HANO's cooperative agreement with the city for the development of Press Park could force HANO to incur liability for property HANO did not develop, and indeed which was developed long before HANO even came on the scene.

As for the insurers' liability, the trial court ruled that the plaintiffs' claims for emotional distress and property damages were covered under the "Personal Injury Liability" ("PIL") provisions of HANO's insurance policies, which applied to "personal injury . . . arising out of" the "offense[]" of "wrongful entry or eviction, or other invasion of the right of private occupancy . . . committed during the policy period." App. 32a; *see* App. 111a. The court considered HANO's interference with plaintiffs' "use and enjoyment of their property" to be equivalent to an invasion of the right of private occupancy. *Id.*[3]

In the trial court's judgment, each insurer's liability was confined to the plaintiffs who were exposed to contaminated soil during that insurer's policy period, and was subject to the insurer's policy limits. App. 53a-55a, 57a-58a. But their liability was *not*

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[3] Moreover, though "bodily injury" as used in the policies would appear by definition to apply to tangible physical injuries, not intangible emotional harms, the court found that emotional distress did in fact amount to "bodily injury" (App. 114a), despite plaintiffs' stipulation below that they were not making any claims for "bodily or personal injury." *See* National Union 4th Cir. Orig. Br. 15. Plaintiffs further stipulated that the National Union CGL policy did not provide coverage for "property damage." *See id.*

confined to residents of Press Park, the only insured property. Rather, without explanation, the trial court held that the insurers were, like HANO, liable to plaintiffs on uninsured property, even though the insurers, *unlike* HANO, were not solidarily liable to them. App. 53a-55a.[4]

Last, the court addressed the question of damages. The plaintiffs' expert had examined five homes and testified that their values had gone down by 17% to 35% as a result of stigma associated with the contamination. National Union Writ App. 20-21. And the record established that some plaintiffs sold property located on the ASL site for *more* than fair market value. HANO Opp. to Pltfs.' Writ App. 5. The trial court nevertheless held that plaintiffs residing within the ASL site were entitled to damages "in the *full amount* of [the property's] present fair market value." App. 117a (emphasis added). For those class members who owned property in the area *adjacent* to the ASL site, the court announced the appropriate measure of damages was "ten percent (10%) of [the

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[4] Thus, for example, the trial court held petitioner U.S. Fire liable to Lizette Gaines, who lived in the adjacent area. App. 53a, 83a-84a. And it held petitioner National Union liable to Ms. Gaines as well as to Nathan Parker, Viola Allen, Peggy Grandpre, and Diarra McCormick, who lived in the City's Gordon Plaza development. App. 54a, 80a-86a. None of those plaintiffs' properties were covered by the relevant insurance policies. *See* App. 31a-32a ("The company will pay on behalf of the insured all sums which the insured . . . shall become legally obligated to pay as damages because of injury . . . arising out of [a listed] offense[] *committed in the conduct of the named insured's business*" (emphasis added)).

property's] fair market value," a figure for which it gave no explanation. *Id.*

Although the trial court also held that class members who lived or worked on the ASL site began to suffer emotional distress only in 1994 "due to the shocking realization . . . that their homes and businesses were located on a 'Superfund Site'" (App. 122a),[5] their damages were to be assessed according to each plaintiff's "years of residence on the ASL site" beginning in 1972 and ending on August 29, 2005, when the site was hit by Hurricane Katrina and "rendered . . . uninhabitable." App. 124a. The trial court set damages figures according to periods of residence – so, for example, plaintiffs who lived on the site for 5 to 10 years received $25,000 total, while plaintiffs who lived there for 15 to 20 years received $40,000. *Id.* The court held that plaintiffs who lived in the adjacent area were entitled to lower, fixed damages for their emotional distress – each would receive $2,500. App. 125a.

3. The Louisiana Court of Appeal affirmed in relevant part, though it reduced the damages awards somewhat. The court decided the property damages awards of 100% property value were valid because "[t]here is objective evidence in the record to make

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[5] The asserted injuries thus arose well after the effective dates of any of the insurance policies at issue. The court nevertheless held that the claims arose within the policy periods because some *exposure* occurred during the policy periods – an inexplicable finding, given that PIL coverage requires the commission of an enumerated intentional offense during the policy period. *See supra* at 6.

such a finding reasonable." App. 22a.[6] Though it found the formulas for assessing emotional distress damages unobjectionable, the court found that the amounts awarded "shock[ed] the conscience" in the absence of physical injury and in its discretion reduced them by 50% across the board. App. 24a. The court did not address the defendants' argument on appeal that both the property value and the emotional distress damage awards violated their rights to due process by imposing an arbitrary formula to decide questions of fact peculiar to the particular plaintiff and property. HANO 4th Cir. Corr. Orig. Br. 33-36. The court also did not discuss the defendants' argument that the awards lacked evidentiary support because the plaintiffs' expert testified that the properties *retained* much of their value, and because there was no connection in the record between the length of residence at the site and emotional distress suffered (particularly since the plaintiffs got damages for decades before they learned of the contamination). *Id.* at 40-45; National Union 4th Cir. Orig. Br. 42-44.

With one dissent, the appellate court agreed with the trial court that the PIL provisions of the insurance policies covered plaintiffs' claims. App. 27a-28a. The court did not seriously address the insurers' argument that at minimum they could not be liable to non-Press Park residents, whose claims against HANO were predicated entirely on HANO's solidary liability with the City. U.S. Fire 4th Cir.

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[6] The court did not specifically identify any evidence in the record it relied upon to support the trial court's determination that the property was worthless.

Orig. Br. 18-20. The court simply gave the insurers a right of contribution, "clarify[ing]" that the insurers "should have to pay all sums owed by HANO to the class, subject to their right to seek contribution from the other insurers, HANO, and the City for any sums they are obligated to pay for claims that fall outside of their terms of coverage." App. 29a. The Court of Appeal thus sanctioned unmitigated monetary liabilities on petitioner insurers that were far beyond the terms of their policies, even as construed by the Court of Appeal.[7]

4. The insurers filed applications for rehearing, arguing that the Court of Appeal's "all sums" liability holding violated their right under the Due Process and Contracts Clauses of the U.S. Constitution by rendering them liable for amounts concededly outside their policy terms. Republic Ins. Co. Reh'g App. 12-13. The Court of Appeal denied rehearing, with Judge Cannizzaro voting to grant. App. 128a.

5. The insurers sought review in the Louisiana Supreme Court, arguing that both the classwide, nonindividuated damages ruling and the extra-policy liability ruling were unconstitutional. National Union Writ App. 1; Republic Ins. Co. Writ App. 20-23. The Louisiana Supreme Court denied review, with

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[7] Judge Cannizzaro strongly dissented from the majority's conclusion that the PIL provisions covered the plaintiffs' emotional distress and property value claims. App. 32a. Judge Cannizzaro recognized that the PIL coverage was limited to the commission of certain enumerated intentional torts (*i.e.*, "offenses"), App. 34a, and observed that not only was HANO's conduct not found to be intentional, App. 35a-36a, but also the requisite interference with a possessory interest was lacking here, App. 39a-40a.

Chief Justice Calogero and Justice Victory voting to grant. App. 129a-132a.[8] This petition followed.

REASONS FOR GRANTING THE WRIT

This case presents two important questions that warrant resolution by this Court.

First, the decision below holds that one private party may be compelled by a court to pay money to another party *even absent any existing legal obligation*. The appellate court in this case required petitioner insurers to pay "all sums" owed to plaintiffs, including damages concededly outside the coverage terms of the insured's policies. No contract, tort rule, or statute imposed on the insurers a duty to pay damages for injuries arising from property outside HANO's Press Park development – they were owed by *the insured*, and *only* by the insured as a solidary obligor with another uninsured defendant (the City). But in an extraordinary deus ex machina, the decisions below simply pronounce that the insurers bear the primary obligation to pay damages to all plaintiffs, without citing a single principle of Louisiana or federal law that could possibly authorize such a naked wealth transfer.

And of course there is none. To the contrary, the decision below contradicts centuries of this Court's precedents prohibiting the Government – including the judicial branch – from simply forcing one party to pay money to another without some basis in law establishing (and giving notice of) the obligation.

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[8] The insurers again raised the latter due process issue in an application for reconsideration, which was not considered. App. 133a.

See infra at 15-19. And it likewise contradicts precedents from other state courts uniformly holding that courts cannot impose on insurers payment obligations beyond those established by the terms of the agreement or positive law. *See infra* at 20-21. Absent review and reversal of the decision below, insurers in Louisiana will be forced to incur monetary liabilities that vastly exceed their policies' unambiguous coverage terms, jeopardizing the resources available to pay actual, covered claims, and undermining the ability of insurers to continue to write affordable insurance in Louisiana.[9]

Second, the decision below awards plaintiffs personal, compensatory damages for actual losses – not statutory damages or civil fines – without requiring *any* evidence establishing the existence or amount of any actual individual losses. "Due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)); *see also Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). Petitioners were denied that fundamental procedural due process right because the trial court's formulaic classwide damages rule rendered individualized

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[9] The Court of Appeal's ruling does not disturb the trial court's ruling that, apart from the liability to non-Press Park residents, each insurer was liable only according to its policy period and terms of coverage. App. 57a-58a. Plaintiffs below noted that they "have never contested that the liability of each of HANO's insurers is governed by the '*applicable* limits of liability' of each insurer's policy." Pltfs. Opp. to U.S. Fire Writ App. 19.

damages evidence irrelevant, denying petitioners their fair opportunity to contest each individual plaintiff's claim of actual loss.

Compensatory damages "necessarily implicate[] the subjective differences of each plaintiff's circumstances," and for this reason they are inherently "an individual, not class-wide, remedy." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417 (5th Cir. 1998). The courts below, however, held that plaintiffs would *not* be required to establish their individual losses based on the "each plaintiff's circumstance," but instead could show both personal emotional injuries and loss to specific property values solely through classwide arithmetic formulas. The rulings below thus foreclosed petitioners from arguing that plaintiffs did *not*, in fact, suffer actual losses – by showing, for example, that an individual plaintiff did not experience any emotional injury or that her own property did not decline in value. The decisions below contradict not only the precedents of this Court establishing the basic procedural due process right to defend against a damage claim, but also precedents of the Third, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits, as well as other state courts, recognizing that when plaintiffs assert damages claims that necessarily turn on individual circumstances of loss, such damages "may be awarded only if the plaintiff submits proof of actual injury." *Id.* at 417.

* * * *

Both issues raised here reflect denials of due process of law in the most literal sense. With no explanation or justification, the decision below compels petitioners to assume monetary liabilities unauthor-

ized by contract or by any rule of common or positive law. And the decision compels both the insurers and their insured to pay damages for individual losses without *any process at all* – much less "due" process – to determine the existence and extent of those individual losses. Neither ruling can be squared with the precedents of this Court and numerous lower courts delineating the core requirements of due process in all U.S. court systems.

Certiorari should be granted.

I. THE DECISION BELOW DEPRIVES PETITIONERS OF PROPERTY WITHOUT ANY EXPLANATION OR LEGAL JUSTIFICATION, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHERS

Petitioners issued comprehensive general liability policies to HANO in connection with its operation of Press Park. The policies provided that petitioners would pay covered damages on HANO's behalf, but only as to certain enumerated offenses committed by HANO in the conduct of its business. App. 31a-32a. The policies' coverage is not in dispute here. It is not the subject of any ambiguity or interpretation. The state courts did not adopt a contested construction of the policy terms – they simply overrode them, ordering petitioners to assume their former insured's liability in the first instance, including potentially millions of dollars in liability to residents of property they never insured.

The ruling is irreconcilable with multiple precedents of this Court and others.

A. This Court's Precedents Prohibit Naked Retroactive Wealth Transfers

This Court has long held that the Constitution's most basic guarantee of due process denies Government the power to "take[] property from A. and give[] it to B," *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.), without a legitimate public purpose and lawful justification. Numerous provisions of the Constitution secure this right as against legislative or regulatory action. The Takings Clause prohibits Government from taking property for non-public uses and without providing just compensation. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32 (2003). The Contracts Clause will invalidate legislation that "nullifies express terms of [a] company's contractual obligations and imposes a completely unexpected liability," especially when those obligations are "in an area where the element of reliance [is] vital." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 246-47 (1978). And the Due Process Clauses of the Fifth and Fourteenth Amendments prohibit statutes imposing severe, unexpected monetary liabilities on parties for past conduct. *See E. Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring); *id.* at 557 (Breyer, J., dissenting).

Although neither the Takings Clause nor the Contract Clause applies expressly to judicial action, the Due Process Clauses clearly do, and they necessarily impose limits on courts akin to the restrictions on legislative action embodied in other provisions. As the Court has explained in the criminal context, "[i]f a state legislature is barred by the *Ex Post Facto* Clause from passing [a retroactive criminal] law, it

must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." *Bouie v. City of Columbia*, 378 U.S. 347, 353-54 (1964). Under this principle, "a judicial alteration of a common law doctrine . . . violates the principle of fair warning, and hence must not be given retroactive effect . . . where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) (quoting *Bouie*, 378 U.S. at 354). The same rule clearly must apply in civil cases as well – the Due Process Clause is concerned equally with liberty and with property, and in both the criminal and civil contexts there is a "crucial difference between simply applying a law to a new set of circumstances and changing the law that has previously been applied to the very circumstances before the court." *Id.* at 471 (Scalia, J., dissenting); *cf. Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring) (invalidating state-law judicial ruling in civil case under Article II standard "parallel" to *Bouie* due process standard).

B. The Decision Below Authorizes Unjustified And Unjustifiable Retroactive Wealth Transfers, In Conflict With This Court's Precedents

The decision below cannot be reconciled with the Court's precedents prohibiting naked, retroactive wealth transfers. When each petitioner issued its policy to HANO, it agreed that upon the happening of a particular enumerated offense, within a particular time period, it would pay out a certain sum of money. Under the state court's "all sums" ruling,

however, when an insurer issues a policy in Louisiana, it exposes itself to liability for which it never contracted and could not have anticipated. That ruling is utterly without plausible justification – indeed, the Court of Appeal did not even purport to offer a justification. And of course petitioners had no warning whatsoever when they issued their insurance policies that their terms could be rewritten by an unexplained and unsupported judicial decision. The decision below is thus wholly "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie*, 378 U.S. at 354; *see Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992) ("notice" or "fair warning" is the "analytic touchstone" of due process analysis); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("foreseeability" is "critical to due process analysis").

It is difficult to imagine a modern judicial ruling more unexpected that the decision below. Indeed, the "all sums" ruling of the Louisiana Court of Appeal for damages outside the policies' terms of coverage is *contrary* to the applicable state law. Louisiana's Direct Action Statute, which is the entire basis for making the insurers parties to this case in the first place, provides that a person injured by an insured entity "shall have a right of direct action against the insurer *within the terms and limits of the policy*." La. Rev. Stat. § 22:655(B) (emphasis added); *see Pareti v. Sentry Indem. Co.*, 536 So. 2d 417, 421 (La. 1988) ("Policy provisions which limit the insurer's liability or place restrictions on policy obligations should be enforced unless they conflict with statutes or public policy."). Yet the decision below

expressly awards plaintiffs damages directly from the insurers "that fall outside of their terms of coverage." App. 29a. That ruling certainly was unexpected, as would be any 180-degree contradiction of existing statutory law.

Nor is the court's action defensible. This case is not an instance of a court applying a regulation that limits an individual's use of his property, *cf. Block v. Hirsh*, 256 U.S. 135, 157-58 (1921); or approving a tax law, *cf. United States v. Carlton*, 512 U.S. 26, 33 (1994); or construing a contract against a party's interest, *cf. Rooker v. Fidelity Trust Co.*, 261 U.S. 114, 117-18 (1923). This is not a court applying a preexisting contract-law rule, such as unconscionability or *contra proferentum*, to a new set of facts, "reevaluating and refining [doctrines] as may be necessary to bring the common law into conformity with logic and common sense." *Rogers*, 532 U.S. at 461-62. Nor is this an instance of a court interpreting an ambiguous contract term against the drafter; to the contrary, the court expressly acknowledged that the award fell "outside [the] terms of coverage" of the insurance policies. This is instead a blatant confiscation of insurer assets without any basis in existing law – as demonstrated by the court's failure to invoke any existing doctrine or precedent supporting its confiscatory ruling.

Insurance policies obviously cannot be priced if their coverage terms – including their limitations – cannot be enforced. But now they are virtually without meaning in Louisiana. What matters now is not what the insurance policy says, but whether the insured was held liable to an assertedly injured party (which defines the scope of the insurer's pri-

mary obligation), and whether the insurer eventually can recover in contribution from the insured or other parties the amounts that the insurer was forced to pay for damages that were outside its policy's coverage terms (which defines the insurer's ultimate obligation).

It is irrelevant that the Court of Appeal granted the insurers a right to pursue "contribution" from the other defendants for amounts "that fall outside their terms of coverage." A "right to contribution is an incident of . . . joint liability," *Erie R.R. v. Erie & W. Transp. Co.*, 204 U.S. 220, 225 (1907) (Holmes, J.), and there was nothing here on which to predicate joint liability: each policy "is between the companies. No other person is a party. The promises are between them severally. Each binds itself to [the other]. There is no joint undertaking or promise . . . to any one else. . . . [There is thus] no doubt as to the intention of the parties in regard to the limit of their several liabilities as between themselves." *Adriatic Fire Ins. Co. v. Treadwell*, 108 U.S. 361, 365 (1883). The Louisiana court did not suggest otherwise. It simply decided, for the first time, to treat an insurance contract as wrongdoing equivalent to the tort itself, the agreement limiting the amount of "injury" attributable to the insurer but creating a joint liability relationship. The holding is wholly without basis in law.[10]

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[10] It bears noting that the right of contribution also provides no practical comfort that petitioners will recover the non-contractual sums, given that many of their co-defendants have few assets or are constrained by statute in their ability to sat-

C. The Decision Below Contradicts Decisions Of Numerous State Supreme Courts Holding That Insurer Liabilities Are Limited By The Policy Terms

Insurance law may generally be a complicated area of state law, but there is one universally accepted principle, rooted in basic constitutional protections against naked retroactive wealth transfers: "[T]he court must enforce the [insurance] contract as the parties have made it and may not . . . remake the contract and impose liability upon the company which it did not assume and for which the policyholder did not pay." *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 172 S.E.2d 518, 522 (N.C. 1970); *see Rosen v. State Farm Gen. Ins. Co.*, 70 P.3d 351, 353 (Cal. 2003) (courts "do not rewrite any provision of any contract, including an insurance policy, for any purpose" (alterations omitted)); *Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776, 787-88 (Mich. 2003) ("[T]he parties are generally free to agree to whatever they like, and, in most circumstances, it is beyond the authority of the courts to interfere with the parties' agreement. Respect for the freedom to contract entails that we enforce only those obligations actually assented to by the parties." (footnote and citations omitted)); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 533 S.E.2d 597, 601 (S.C. Ct. App. 2000) ("An insurer's obligation under a policy of insurance is defined by the terms of the policy itself, and cannot be enlarged by judicial construction."); *Medlar v. Aetna Ins. Co.*, 248 A.2d 740, 747

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isfy judgments. *See, e.g.*, La. Rev. Stat. § 40:405; La. Rev. Stat. § 13:5109(B)(2).

(Vt. 1968) ("It is the duty of the courts to construe contracts, not make them [for the parties], and courts can only enforce agreements as written and are without authority to rewrite contracts, even insurance contracts.").[11] While this rule has been recognized by too many courts to name comprehensively, its existence and merit have not been questioned anywhere to petitioners' knowledge.

Until now. The decision below does not explain its departure from the broad consensus, nor does (or could) it justify its outcome as within any current understanding of insurance or black-letter contract law. Instead the decision simply adopts and applies a new rule of Louisiana law, under which a court may "impose liability upon the [insurance] company which it did not assume and for which the policyholder did not pay." *Wachovia*, 172 S.E.2d at 522. That holding cannot be reconciled with the fundamental, due-process-based protections every other state jurisdiction affords to contracting parties, including parties to insurance contracts: their bargain will be respected, absent violation of a statute or a recognized common-law rule precluding enforcement of the agreement. Neither is present here.

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[11] *See also Hardee v. Hardee*, 585 S.E.2d 501, 503 (S.C. 2003); *Elliott v. Darwin Neibur Farms*, 69 P.3d 1035, 1040 (Idaho 2003); *Yarcheski v. Reiner*, 669 N.W.2d 487, 495 (S.D. 2003); *Alpine Haven Prop. Owners Ass'n v. Deptula*, 830 A.2d 78, 86 (Vt. 2003); *Standard Banner Coal Corp. v. Rapoca Energy Co.*, 576 S.E.2d 435, 437 (Va. 2003); *Heitz v. Clovis*, 578 S.E.2d 391, 395 (W. Va. 2003); *Columbia Propane, L.P. v. Wis. Gas Co.*, 661 N.W.2d 776, 783 (Wis. 2003); *Aerojet-Gen. Corp. v. Transp. Indem. Co.*, 948 P.2d 909 (Cal. 1997).

Imagine the decision below enacted as a statute by the Louisiana legislature:

> *Section One.* Existing insurance agreements will now cover *all* damage liabilities incurred by insureds, notwithstanding any coverage terms set forth in the policies.
>
> *Section Two.* Insurers may pursue contribution from insureds or other parties for damages amounts paid under Section One outside the coverage terms of the policies.

Presumably no court would hesitate to declare that statute an unconstitutional retroactive transfer of wealth from insurers to insureds, or to those to whom insureds are judgment-debtors. Yet the decision below directs precisely that result, putting itself, and Louisiana insurance law generally, into conflict with long-settled decisions of this Court and others. Certiorari should be granted.

II. THE DECISION BELOW ASSESSES INDIVIDUAL ACTUAL LOSSES SOLELY ON THE BASIS OF NONINDIVIDUAL, CLASSWIDE FORMULAS, IN CONFLICT WITH DECISIONS OF NUMEROUS FEDERAL CIRCUITS

Compensatory damages are "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Cooper Indus., Inc. v. Leatherman Tool Group*, 532 U.S. 424, 432 (2001). They are, like any other element of a plaintiff's claim, subject to proof: the "amount awarded varies in accordance with the nature and extent of the damages for which compensation is made." *Ariz. Copper Co. v. Hammer*, 250 U.S. 400,

426 (1919). The state court in this case, however, assessed damages that bore *no* relationship to "the nature and extent" of each plaintiff's injury. By awarding individual plaintiffs damages without regard to the circumstances of each individual plaintiff's subjective situation, the decision below deprived petitioners the most basic "process" that is "due" to them in a judicial proceeding: the right to fairly contest the claims against them.

A. The Compensatory Damages Awards Below Were Wholly Nonindividualized

The damage award in this case can be broken down into four basic categories: (1) lump amounts for emotional distress awarded according to years of residence; (2) a lump sum of $1,250 for the emotional distress of people who lived nearby; (3) total fair market value in stigma-related property damages for residents of the ASL site; (4) 10% of fair market value in property damages for those who lived nearby. None of those sums bears any relationship to the injury suffered by the particular plaintiff to whom damages were awarded.

Emotional Distress Damages. Emotional distress damages are inherently individualized and "may be awarded only if the plaintiff submits proof of actual injury." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417 (5th Cir. 1998); *see also Carey v. Piphus*, 435 U.S. 247, 264 (1978) (mental and emotional distress damages require "proof that such injury actually was caused"). The trial and appellate courts below, however, waived the requirement of actual injury. Instead the courts awarded lump sums that simply *assumed* a *fixed* amount of emotional injury

for each person. But it hardly takes sophistication in psychological studies to know that people react differently to events in their lives. And while the courts did try to account for one variable among the plaintiffs – their time of residence – the courts still had no basis for assuming that plaintiffs within the same time categories had the same emotional response. Even the selection of that variable was arbitrary: it makes no more sense to say an individual's emotional distress necessarily varied according to the length of her residence than it would to say it necessarily varied according to the size of her property, or the number of family members she had for whom she might have been concerned. Virtually any variable would have been equally arbitrary, for a simple reason: the emotional distress any given person will experience *depends on the person*.

Nor did the lump sum awards, which the state courts tied to a years-of-residence formula or to where the person lived, have any basis in *fact*. One person's year of knowledge could have caused him $100 in distress, another person's year could have amounted to $1,000 worth. One nearby resident might have suffered $500 in emotional distress, another nearby resident might not have even *learned* about the nearby contamination. Again, it is impossible to say without developing an evidentiary record for the particular plaintiff.

Property Damages. The state court's approach to damages for lost property value is no less problematic. An across-the-board determination that properties are worthless makes no sense unless there is some evidence indicating that, in fact, all the properties are indeed worthless. Not only is that assump-

tion factually unsupported here, it is actually contrary to the undisputed record: plaintiffs' own expert testified that the five homes he examined had suffered stigma-related depreciation ranging from 17% to 35%, and some plaintiffs sold property on the ASL site for more than fair market value. But the courts' damages judgment assumed 100% diminution in value – a figure that bears no connection to the record evidence. The court's award of 10% in lost property value for adjacent-area residents is similarly irrational – *nothing* in the record even suggested that adjacent residents suffered such a categorical diminution in property value.

B. The Court Of Appeal's Holding That Individual Damages May be Determined On A Nonindividuated Basis Conflicts With Decisions Of Numerous Federal Circuits

This Court recently reiterated that state courts cannot impose monetary punishment on "an individual without first providing that individual with 'an opportunity to present every available defense.'" *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). The Due Process Clause guarantees defendants a "right to litigate the issues raised," *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) – a right that applies to issues of damages no less than it does to issues of liability. *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (due process guarantees each litigant the "opportunity to present his case and have its merits fairly judged"); *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88, 93 (1913) ("All parties must be fully apprised of the evidence submitted or to be considered, and must be

given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding . . . ."); *accord Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103-04 (1963).

A defendant's basic due process right to contest each and every claim presented in a judicial proceeding necessarily applies to the determination of compensatory damages. "Compensatory damages for emotional distress and other intangible injuries are not presumed from the mere violation of constitutional or statutory rights, but require specific individualized proof, including how each Plaintiff was personally affected . . . and the nature and extent of the harm." *Decorte v. Jordan*, 497 F.3d 433, 442 (5th Cir. 2007). Accordingly, the Third, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits, and other state courts, have held that when compensatory damages "implicate[] the subjective differences of each plaintiff's circumstances," they "may be awarded only if the plaintiff submits proof of actual injury." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 417 (5th Cir. 1998); *see Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 (4th Cir. 2006) ("A class-action claim for monetary relief may present common questions of liability, but, because the goal of the damage phase is to compensate the *plaintiffs* for their *individual injuries*, the claim will generally require the court to conduct individual hearings to determine the particular amount of damages to which each plaintiff is entitled."); *Reeb v. Ohio Dep't of Rehab. & Corr., Belmont Corr. Inst.*, 435 F.3d 639,

650 (6th Cir. 2005) (following *Allison*); *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 472 (7th Cir. 2004) (in a class action, some issues, "such as assessment of damages for each [plaintiff], must be handled individually"); *Cooper v. Southern Co.*, 390 F.3d 695, 720 (11th Cir. 2004) (commonality of injury "begins to break down when the class seeks to recover . . . monetary relief to be allocated based on individual injuries" (quoting *Allison*, 151 F.3d at 413)), *overruled in other part on other grounds by Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006); *Barabin v. Aramark Corp.*, 2003 U.S. App. LEXIS 3532, at *5 (3d Cir. 2003) (recognizing that "[w]here monetary relief is requested," "awarding damages normally entails examination of individual claims"); *S.W. Ref. Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000) (class action defendant is "entitled to challenge the credibility of and its responsibility for each personal injury claim individually"); *Rollins, Inc. v. Butland*, 932 So. 2d 1172, 1185 (Fla. Dist. Ct. App. 2006) ("Although a trial court confronting a massive class action may find it tempting to allow proof of 'patterns' and 'common schemes' to paper over the dissimilarities attendant to individual claims, considerations of administrative convenience do not trump the class action defendant's right to due process of law"). Applying the requirement of individualized proof when damages are subjective, these precedents all reject class actions on the ground that individualized damages inquiries defeat the predominance of common issues necessary to permit classwide adjudication. *See, e.g., Allison*, 151 F.3d at 416-18; *see also generally Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 342-43 (4th Cir. 1998) (explaining why

"inherently individualized" damages are not amenable to "generalized or class-wide proof").

Other circuits, by contrast, do allow class certification at the threshold liability stage, despite the prospect of individualized damages inquiries later in the case. *See Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *Molski v. Gleich*, 318 F.3d 937, 949, 955 (9th Cir. 2003). The Second Circuit, however, has warned that due process may require an individualized analysis at the compensatory damages stage of the case. *See Parker*, 331 F.3d at 22. In "a sufficiently serious case," the Second Circuit explained, invoking due process precedents from this Court, "the due process clause might be invoked . . . to nullify [certification] and reduce the aggregate damage award." *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996)). The Ninth Circuit takes the most extreme approach to classwide adjudication of damages issues, holding that even subjective compensatory damages may be recovered on a categorical, classwide basis merely so long as due process protections were afforded for *plaintiffs*. *Molski*, 318 F.3d at 949, 955. While the Second and Ninth Circuits thus disagree over the propriety of classwide compensatory damages determinations when damages vary "depending on the circumstances and merits of each claim," *Robinson v. Metro-N. Commuter R.R.*, 267 F.3d 147, 165 (2d Cir. 2001), both circuits agree that the only significant due process risk is to *absent class members* – the rights of defendants to litigate each claimant's actual loss drops out of the picture entirely for both the

Second and Ninth Circuit, just as they did for the Louisiana Court of Appeal in this case.

As the courts on the other side of the divide have understood, that outcome cannot be countenanced in a judicial system that determines rights and liabilities through an adversarial presentation of competing claims and defenses. In this case, for example, by assessing individual damages issues like personal emotional harm and lost property value on a nonindividuated basis, the Louisiana courts deprived petitioners of the opportunity to demonstrate that, for any given claimant, the lump sum or classwide formula *does not correctly determine the existence or amount of that claimant's damages*. As to emotional injuries, some class members may not have been particularly distressed about the contamination, and some may not have even *known* about it. As to property values, the contamination (and EPA's remediation of the area) undoubtedly affected different class members' property differently; the testimony at trial in fact demonstrated that it *did* have a variable effect.

The point is that *both* plaintiffs *and* defendants have due process rights to contest claims and defenses, especially on such central issues as the existence and extent of actual damage. Because the damages to which each class member is entitled will necessarily depend on his or her individual circumstances, it is impossible to fairly determine damages by ignoring those individual circumstances and prohibiting the defendants from examining the same. To award individual damages according to a nonindividuated, classwide formula is to deny defendants

the most basic "process" that is "due" in an adversarial justice system.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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